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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

and

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Chamber of Commerce of the United States of America ("the Chamber"), on behalf of itself and its member Dow Chemical Company ("Dow"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

ORDERS AND OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. 1a-6a) [1] is not yet officially reported. The discovery order of the district court (Pet. App. pp. 7a-8a) is likewise unreported.

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[1] "Pet. App." refers to the appendices attached to the instant "Dow" petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. p. 9a) was entered on July 1, 1975. On August 21, 1975, the court of appeals denied the Chamber's timely petition for rehearing (Pet. App. p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether any membership association can be required, consistent with the First Amendment right of freedom of association, to disclose the identities of its injured members through a discovery order as a condition to engaging in civil litigation on behalf of its members where standing requires the association to plead the injury of at least one of its members.

2. Whether an immediate appeal of a pretrial discovery order is appropriate under 28 U.S.C. § 1291 as an important question where the order infringes upon the rights of all membership associations to initiate litigation on behalf of their injured members.

3. Whether a writ of mandamus should lie where a pre-trial discovery order violates freedom of association rights and the protective provision is inadequate to protect against widespread dissemination.

STATUTES AND RULES INVOLVED

The relevant provisions of the United States Constitution, the United States Code 28 U.S.C. § 1291 and 28 U.S.C. 1651(a) and Rule 37(b) of the Federal Rules of Civil Procedure are set forth below:

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 37(b) Failure to comply with order.

> (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or

defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination. . . .

STATEMENT

A. The Order of the District Court

The order of which review is sought arises from an action in which the Chamber,[2] as a plaintiff, has challenged the payment by the State of Michigan, through its Employment Security Commission ("MESC"),[3] of employment compensation benefits to striking employees. On July 25, 1972, the Chamber,

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[2] The Chamber is an association consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. A number of the Chamber's members are employers subject to the Michigan Employment Security Act, 12 M.S.A. § 17,501 *et seq.* ("MESA") which requires them to make contributions to the Michigan Employment Security Commission, and are, as well, subject to the Labor Management Relations Act of 1947, as amended, 49 U.S.C. §151 *et seq.* ["LMRA"] whereunder they are obligated to bargain collectively with the bargaining representatives of their employees.

[3] The Michigan Employment Security Commission is charged with the enforcement, operation and execution of MESA and has applied MESA so as to provide unemployment benefits to striking employees and to charge such benefits against the employers involved.

together with and on behalf of one of its injured members, Dow,[4] filed a complaint for declaratory judgment and injunction to enjoin and nullify the Michigan Employment Security Act insofar as that statute authorizes the payment of unemployment benefits to striking employees (Pet. App. pp. 18a-19a).[5] The complaint alleged that such state payments to strikers contravene federal labor policy by disrupting the congressionally established scheme of free collective bargaining and, thereby violate the Supremacy Clause of Article VI, Clause 2 of the Constitution of the United States (Pet. App. p. 17a).

During the course of pre-trial discovery, the Steelworkers[6] served upon the Chamber a set of twenty-two interrogatories (Pet. App. pp. 23a-33a). The interrogatory at issue here requested the Chamber to identify all its members subject to the Michigan Employment Security Act since January 1, 1968 (Pet. App. p. 23a).

On June 27, 1974, the district court over the objections of the Chamber, issued its Memorandum Opinion requiring the Chamber to disclose the identity of its members subject to MESA (Pet. App. pp.

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[4] Dow is an employer subject to MESA and is, therefore, required to make contributions to MESC. Dow is also subject to the LMRA and is required to bargain collectively with the bargaining representative of its employees.

[5] Such benefits had in fact been paid at various times to striking employees of Dow during the course of strikes by the Steelworkers at Dow's Midland and Bay City, Michigan facilities.

[6] The Steelworkers were granted leave to intervene on September 5, 1972. The Steelworkers are the certified bargaining representative of the striking employees of Dow.

34a-38a).[7] The district court rejected the Chamber's assertion of constitutional privilege, because in its view the Chamber had not "clearly documented" the harm to its members which would result once the Steelworkers obtained the requested information. The district court further ruled that the names of the Chamber's Michigan members were relevant to this action and necessity for the Steelworkers defense (Pet. App. p. 36a). The court also concluded that, in bringing this action, the Chamber waived any constitutional privilege against disclosure of its members' identities which it may have enjoyed (Pet. App. p. 37a). On October 4, 1974, the district court issued an order compelling the Chamber to furnish the Steelworkers with a list of its Michigan members subject to MESA within 30 days (Pet. App. pp. 7a-8a). The court issued a protective order which provides (Pet. App. p. 8a):

> Defendant-intervenor United Steelworkers of America, AFL-CIO-CLC shall not make use of the list of member business firms which plaintiff The Chamber of Commerce of the United States of America must provide in its answer to Interrogatory No. 1 of the Revised Amended Interrogatories or disclose the identity of such member business firms except to defendant-intervenor United Steelworkers of America, AFL-CIO-CLC's employees and then only when necessary to prepare for and assist in the defense of this action.

On October 18, 1974, the Chamber moved the district court to reconsider its October 4, 1974 Order

[7] In addition, the district court held that the Chamber must respond to certain other Interrogatories. In accordance with that holding and the district court's subsequent October 4, 1974 order, the Chamber timely answered the Steelworkers' revised and amended Interrogatories.

and submitted comprehensive documentary evidence of the irreparable injury which disclosure would cause. This motion was denied on October 29, 1974 (Pet. App. p. 43a). Thereafter, the Chamber moved the district court to amend its October 4, 1974 Order to permit an immediate appeal pursuant to 28 U.S.C. § 1292(b) (Pet. App. pp. 44a-48a.) The motion was denied by order dated November 6, 1974 (Pet. App. p. 49a). On November 4, 1974, the Chamber filed a notice of appeal from the district court's discovery order (Pet. App. p. 50a), and on November 6, 1974, the district court stayed its order pending appellate review (Pet. App. p. 49a).

B. The Decision of the Court of Appeals

The court of appeals concluded it had no jurisdiction under 28 U.S.C. § 1291 to hear an appeal of a discovery order, and suggested that the Chamber "can obtain effective review . . . by failing to comply with the order and perfecting an appeal should the district court impose [contempt] sanctions under Rule 37(b) F.R.C.P." (Pet. App. p. 5a). With respect to the Chamber's reliance upon the All Writs Act (28 U.S.C. § 1651(a)) as a basis for jurisdiction, the court ruled that the Chamber "failed to meet its burden of showing extraordinary circumstances which would entitle it to [a writ of] mandamus". (Pet. App. p. 6a).

REASONS FOR GRANTING THE WRIT

I. The Court Must Resolve The Dilemma Which The District Court's Discovery Order Places All Associations Who Engage In Litigation On Behalf Of Their Members.

A writ of certiorari is warranted to decide whether an association must forfeit the First Amendment rights

of its members to support anonomously association litigation whenever the association institutes litigation on behalf of its injured but unidentified members. To institute litigation an association must allege injury to itself or at least one of its members. *Warth* v. *Seldin*, — U.S. —, 95 S.Ct. 2197, 2213 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972); *NAACP* v. *Alabama*, 357 U.S. 449, 458-60 (1958). Here, the Chamber alleged the injury of its member Dow and that of its other Michigan members who subsidize Michigan's payments to striking employees (Pet. App. p. 13a). The district court held that by pleading the injury of these Michigan members, the Chamber waived any First Amendment privilege which might bar disclosure. This ruling constitutes a substantial abridgement of the rights of all associations to engage in interest litigation on behalf of their anonmous members. All membership associations are now required to choose between disclosing the identities of their members in order to establish standing or forego entirely initiating any litigation. This imposed choice between litigation or membership anonymity restrains fundamental freedom of association rights and conflicts with the rulings of this Court.

The Court has consistently recognized that the right of freedom of association guaranteed by the First Amendment protects the anonymity of persons who associate together to advance common interests or common causes which they espouse. *NAACP* v. *Alabama*, *supra*, 357 U..S at 462; *Gibson* v. *The Florida Legislative Investigative Committee*, 372 U.S. 539 (1963); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). This constitutional right specifically includes advancement of commonly held views and social goals through litigation. *United Trans. Union* v. *State Bar of Michigan*,

401 U.S. 516, 585-86 (1971). This essential means of promoting goals and securing objectives depends upon the support of individual members. Unless anonymity can be guaranteed, such support is likely to cease entirely, particularly where the association espouses unpopular and controversial beliefs. *NAACP* v. *Alabama, supra,* 357 U.S. at 459; *Bursey* v. *United States,* 466 F.2d 1059, 1085 (9th Cir. 1972). Identification, particularly by a historical adversary, has a "chilling" effect[8] upon the willingness of the member to continue to espouse association goals. This is so because identification places the member in a highly visible position, which, in turn, renders the member subject to the risk of various forms of retaliatory pressures.[9] As a three judge panel of the United States District Court for the District of Columbia recently remarked:

> "[i]t is well established that the requirements of public disclosure and reporting of membership lists cast a chilling effect upon an individual's right to associate freely and to voice personal views through organizational ties." *American Civil Liberties Union* v. *Jennings,* 366 F. Supp. 1041, 1055 (1973), *appeal pending sub nom Staats* v. *ACLU,* (Sup.Ct. No. 73-1413)

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[8] *Cf. Textile Wkrs.* v. *Darlington Mfg. Co.,* 380 U.S. 263, 275 (1965).

[9] In view of the commonly recognized antagonisms which exist between the Chamber and organized labor, individual Chamber members may well be foreclosed from supporting or remaining members in their association if their identities can be discovered by any labor organization during litigation. The fear of reprisals from labor organizations whether or not actually realized, is very likely to result in termination of membership in the Chamber, deter potential members from joining, and prevent altogether the continuation of many forms of associational litigation.

To be sure these authorities involve associations composed of natural persons. The Chamber's membership embraces corporations, partnerships and other forms of business organizations as well as individuals. This difference does not mean that a corporate membership association can be denied all First Amendment protection. It has long been held that corporations are persons within the meaning of the Fifth and Fourteenth Amendments. While the question has not been squarely decided, the Court has at least suggested that corporations are also entitled to exercise First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243-44 (1935); *May Dept. Stores* v. *Labor Board*, 326 U.S. 376, 404 (1945) (Rutledge, J. concurring in part). These authorities raise at least a colorable claim of First Amendment protection here. And such protection including freedom of association should be accorded because corporate association members are potentially subject to the same liklihood of retaliation and pressure because of positions advocated as natural persons associations like the NAACP.[10]

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[10] If the Court is of a different opinion, this issue presents another important question which warrants immediate review. This Court has recently relaxed the standing requirements which associations must meet in order to have access to the courts. *Warth* v. *Seldin, supra.* See also *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The future promises more association type litigation and accordingly, it is now timely to resolve the scope of First Amendment rights available to all associations, regardless of the nature of their members.

The courts below did not rule on this question, because they believed it unnecessary. It is nevertheless properly before the Court and should be decided so as to fully resolve the Chamber's assertion of a constitutional privilege to the confidentiality of the membership list. See *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 186 (1973); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111, 112 (1964).

The holding below that such a basic right can be waived by simply initiating litigation is also contrary to the Court's ruling in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). The Court, speaking through Mr. Justice Goldberg, specifically rejected early state court cases apparently holding that a litigant who initiates a legal proceeding to recover monetary compensation for personal injuries waives any right "to claim the inviolability of his person." 379 U.S. at 113. Instead, the Court suggested there would be "constitutional problems" with any rule holding that a litigant can be said to waive rights "by exercising his right of access to the federal courts." 379 U.S. at 114. Here, the district court relied upon the Chamber's suit on behalf of its Michigan member employers to hold that the Chamber had waived any constitutional claim supporting nondisclosure (Pet. App. p. 37a). Because disclosure strikes at the heart of the Chamber's ability to function as the representative of all its members, this ruling penalizes the Chamber's right of access to the federal courts to the same extent as a rule holding that a plaintiff in a negligence suit waives any right to assert protections against search and seizure of his person. Accordingly, the district court's ruling constitutes an improper extension to the federal courts of the state court cases previously rejected by the Court in *Schlagenhauf* v. *Holder*, *supra*, and review should be granted to prevent this development.

There could be circumstances where the identity of an association's members is properly subject to the disclosure provisions of the Federal Rules of Civil Procedure. However, this is not the situation here. The identity of the Chamber's Michigan members is irrelevant to the preemption issues posed by the underlying

litigation. As this Court stated in *Super Tire Engineering* v. *McCorkle,* 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers . . . pervades *every* work stoppage, affects *every* existing collective-bargaining agreement, and is a factor lurking in the background of *every* incipient labor contract. (Emphasis added)

Accord: *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 458-59 (1st Cir.), cert. denied, 414 U.S. 859 (1973). Whether any Michigan member of the Chamber other than Dow suffered strikes is irrelevant under this legal standard since the cumulative effect of all strikes upon all employers regardless of any membership association determines the underlying federal preemption issue raised by this litigation. The identity of all Michigan employers who have been subjected to strikes is readily available from the Michigan Employment Security Commission which also maintaines records of strike duration and the amounts of funds dispersed to striking employees. Thus, the Steelworkers have a comprehensive administrative source for all data relevant to the defense of this suit. As the Court noted in *Schlagenhauf* v. *Holder, supra,* 379 U.S. at 118: "The ability of the movant to obtain the desired information by other means if also relevant." [11]

And in *Warth* v. *Seldin, supra,* the Court precluded the Steelworkers from using the identity of the Chamber's Michigan members to challenge the Chamber's standing to initiate this litigation. Writing for the majority, Mr. Justice Powell stated (95 S.Ct. at 2211-12);

[11] In the *Grinnell* litigation this same information is available to the Steelworkers from the Rhode Island Department of Employment Security.

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. (Citing *National Motor Freight Traffic Assn.* v. *U.S.*, 372 U.S. 246 (1963)) . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. (Citing *Sierra Club* v. *Morton, supra*). So long as this can be established and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the courts jurisdiction.

Accordingly, this decision makes clear that no additional disclosure of the identities of any Chamber members is necessary to establish the Chamber's standing to initiate the underlying cause of action. This is not a cause then where the identities of the Chamber's Michigan members are of any relevance to the issues posed.

In short, the ruling below poses a critical dilemma for associations which wish to exercise their right to engage in representational litigation. All associations may now be required to identify their members in order to accomplish the litigative purposes for which the members sought anonymously to ban together. This Court should grant certiorari to review this question and to define the circumstances, if any, where disclosure of association membership lists may be appropriate in civil litigation.[12]

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[12] This petition is unlike the one in *Auto Workers* v. *National Right to Work Legal Def. and Ed. Foundation*, 376 F. Supp. 1060 (D.D.C. 1974), appeal dismissed, —— F.2d ——, 88 LRRM 2314 (D.C. Cir. 1974), cert. denied, 419 U.S. 1132, where an "over-

II. There Must Be An Appeal Route Other Than Contempt To Obtain Judicial Review Of A Pre-Trial Order Where That Order As A Practical Matter Determines The Validity Of A Claim of Constitutional Immunity.

Before the significant and timely First Amendment question presented by this petition can be reached, the Court must consider an equally important threshold problem which also requires resolution. The court of appeals' judgment was that in these circumstances neither a writ of mandamus nor an appeal under 28 U.S.C. § 1291 will lie (Pet. App. pp. 5a-6a). The Chamber's certiorari petition presents the Court with an overdue opportunity "to derive a formula that will take hardship cases out from under the rigidity of previous declarations. . . ." (*Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1949)) with respect to immediate appeals from discovery orders where disclosure impinges upon constitutional rights and results in injury to a nationwide class of litigants. It is essential to our judicial system that all litigants have immediate access to the appellate courts to obtain effective review of constitutional questions which threaten interests far beyond the underlying litigation. As Chief Judge Haynsworth wrote in *United States* v. *Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966):

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riding and compelling need" going to the heart of the litigation was shown for the production of the Foundation's financial subscribers. There, the central allegation of the unions' action was that the Foundation had violated 29 U.S.C. § 411(a) (4) by acting as a conduit for "interested employers" financing litigation against various labor organizations, to which the subscribers' list was an essential element of proof.

> When a pretrial order is clearly erroneous, an appellate corrective ought to be available if compliance with the order would work a substantial and irreparable deprivation or if the only alternative is submission to a contempt order.

A. 28 U.S.C. § 1291 authorizes an immediate appeal from pretrial orders without the necessity of a contempt citation

The *Cohen* [13] doctrine plainly contemplates immediate access by parties to the appellate courts where interlocutory orders raise important questions which transcend the particular issues in the underlying litigation. In *Cohen,* the Court stressed the importance of the issue it was called upon to decide:

> "[W]e do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security . . . appealability would presents a different question." 337 U.S. at 547.

Similarly here, as set forth above, the dilemma which the instant discovery order poses for associations everywhere is an important and significant question which requires immediate resolution. To be sure the circuit courts of appeals agree the usual garden variety discovery order is not a "final order" within the scope of 28 U.S.C. § 1291. Wright & Miller, *Federal Practice & Procedure: Civil* § 2006. However, there is a split in the circuits with respect to the immediate appealability of interlocutory discovery orders under this provision

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[13] *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (collateral issues which raise important questions are immediately appealable under 28 U.S.C. § 1291).

where third party rights are affected. See *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 996 (10th Cir.), cert. denied, 380 U.S. 964 (1965). Here, the parties actually injured by the district court's discovery order are the Chamber's Michigan members who are not parties to this litigation. These members could not initiate an appeal of the discovery order without simultaneously revealing their identity and thereby mooting the appeal. *NAACP* v. *Alabama, supra,* 357 U.S. at 459; cf. *Preiser* v. *Newkirk,* — U.S. —, 95 S. Ct. 2330 (U.S. No. 74-107) (June 25, 1975). Thus, only the Chamber is in a position to perfect such an appeal on behalf of its Michigan members. An association must be able to assert the injured interests of its members particularly where, as here, the injury goes to the loss of anonymity and the membership is unable by operation of legal doctrines like mootness to assert its own injury.

In addition, this case is not the usual discovery order appeal where the discovered party simply objects to providing its opponent with information which might reveal tactical trial strategy. The theory of the underlying litigation and the expert studies which support the Chamber's position that state compensation for strikers is contrary to national labor policy is fully known to the Steelworkers from other discovery requests voluntarily complied with by the Chamber in this litigation. Moreover, the consequences of discovery here are not, as in the usual case, limited to the trial of the instant litigation. The relationship between the Chamber and its members is designed to be a permanent and continuing one. Discovery here threatens to sever these long-term relationships, and will have an adverse impact upon the right of corporate members to associate for the purpose of initiating common interest litigation long after this particular litigation is over.

In these unique circumstances, the authorities referred to above holding discovery orders non-appealable are readily distinguishable and the appealability question presented here is of significance to associations everywhere and one this Court has not previously addressed.[14]

The Court of Appeals ruled that the Chamber could perfect appeal of this important question by simply submitting to a contempt citation. However, the contempt route is not an assured means of perfecting an immediate appeal because a civil contempt citation is insufficient to permit appeal until the trial litigation concludes. *Fox* v. *Capital Co.*, 299 U.S. 105 (1936); *cf. Sibbach* v. *Wilson & Co.*, 312 U.S. 1,6-7 (1941); *Southern Ry. Co.* v. *Lanaham*, 408 F.2d 348, 350 (5th Cir. 1969) (C. J. Brown, dissenting). As the First Circuit candidly recognized in *Chamber of Commerce* v. *Hackett*, (*Grinnell* Pet. App. 7a): "Admittedly, there is less certainty as to whether an order adjudicating a

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[14] Even within the present scope of the *Cohen* doctrine, the Chamber is entitled to an immediate appeal under this "collateral order doctrine." For the reasons set forth *supra*, pp. 11-13, there is no connection between the identity of the Chamber's Michigan members and the legality of state payments to strikers under national labor policy. As we have also demonstrated above, contempt is not a viable alternative to an immediate appeal under 28 U.S.C. § 1291, and thus there is a great likelihood that any effective judicial review of this wholly collateral question will be irretrievably lost. Finally, the question of whether a membership association can be required to disclose the identities of its membership as a condition of engaging in associational litigation is "too important to be denied review." *Cohen* v. *Beneficial Indus. Loan Corp.*, *supra*, 337 U.S. at 546. Since the Chamber's appeal fully satisfies all the elements for an immediate appeal, the court of appeals erred in dismissing this cause for lack of jurisdiction.

party in civil contempt would be appealable." Moreover, there is a difference of option among the circuits as to whether any type of contempt order is a prerequisite to appeal. Compare *United States* v. *Hemphill, supra;* and *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (10th Cir.) cert. denied, 380 U.S. 964 (1965) with *Bank Line* v. *United States,* 163 F.2d 133 (2d Cir. 1947); *Gialde* v. *Time, Inc.,* 480 F.2d 1295 (8th Cir. 1973); and the opinions of the Sixth and First Circuits appealed here.

The contempt process is lengthy and time consuming as well as uncertain. The resisting party must first be found guilty of *criminal* contempt and then must participate in a separate contempt proceeding and be cited with a contempt judgment before any putative appeal is available. *Fraser* v. *United States Court,* 145 F.2d 139, 144 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945). But such a proceeding may not actually provide any basis for appeal. See, *e.g., United States* v. *IBM Corp.,* 492 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974). A contempt citation then does not guarantee appealability of a discovery order. And requiring an aggrieved party even to risk contempt sanctions in order to obtain review with respect to a claim of First Amendment rights, itself creates a chilling effect, for many litigants may well choose to forebear from exercising such rights, rather than risk the penalties of fine or incarceration. Moreover, in association litigation, a criminal contempt citation places the burdent of compliance not upon the member whose association identity is about to be disclosed, but upon an officer of the association whose right of association is unaffected by the discovery order. Accordingly, the court of appeals erred both in declining to accept juris-

diction and by remitting the Chamber to an appeal route which may be entirely illusory.[15]

B. A Writ of Mandamus is appropriate to obtain review of a discovery order which impairs the free exercise of First Amendment Rights.

If an immediate appeal does not lie under the collateral order doctrine, a writ of mandamus is appropriate to review an order which impinges upon the exercise of fundamental rights. Indeed, the Court has already expressed its interest in resolving the role of mandamus as a means of obtaining immediate appellate review of a discovery order in similar circumstances.

On May 27, 1975, the Court granted a petition for a Writ of Certiorari to the Ninth Circuit in *Kerr* v. *U.S. District Court,* —— U.S. ————, 95 S. Ct. 1988 (U.S. No. 74-1023). In *Kerr,* as the Chamber contends here, California argues that some procedure for review must be available in circumstances where pre-trial discovery orders threaten irreparable harm to important third party interests. There, the underlying litigation involved a class action against California penal and correctional agencies to determine the due process requirements at state parole and disciplinary proceedings. Plaintiffs obtained a discovery order which, *inter alia,* required production

[15] Normally an immediate appeal lies after imposition of the other contempt sanctions permissible under Rule 37 Fed. R. Civ. Pro. See pp. 3-4, *supra.* However, sanctions such as dismissal of the suit or striking defenses effectively deprive the Chamber of participation in the underlying litigation while an appeal is perfected, argued and ultimately decided. Thus, these sanctions operate just as the district court's discovery order to deny the Chamber the right on behalf of its members of instituting litigation on behalf of its membership.

of the correctional files of over 1,000 California correctional facility inmates. The district court's protective order limited inspection of the inmates' files to plaintiff's counsel, limited the use of the files to the case at hand, and required inmates' consent before inspection of their files. Because this protective provision was inadequate, California sought a writ of mandamus to review the discovery order, which the Ninth Circuit dismissed on jurisdictional grounds.

In the instant litigation the district court's discovery order is also inadequate to prevent widespread disclosure of the identities of the Chamber's Michigan members and the fact of such disclosure reasonably interferes with important associational rights. As set forth, supra, p. 6, the district court's "protective" order grants access to the Chamber's Michigan membership list to any and all Steelworkers' employees who "prepare for and assist in the defense of this action." Even assuming that the employees, who receive copies of this list, have at least some tangential relationship to this case, it is totally unreasonable and contrary to human nature to expect this knowledge to disappear from memory when this litigation concludes. Steelworkers' employees and agents, having seen and worked with these lists in connection with this case, will not simply expunge from their memories the names of the Chamber's members. Instead, the identity of the Chamber's members, and their connection with this and other litigation brought by the Chamber, will forever be exposed to the Steelworkers and others who gain access to the membership list, including representatives of the AFL-CIO who are also members of the Steelworkers' Union. Long after the underlying litigation concludes and the district court

is without jurisdiction to take any steps to enforce its protective order, this information will remain in the possession of a labor organization which, like most unions, is an intractable political opponent of the Chamber. This entreé provides an accurate laundry list of those employers in Michigan and elsewhere (in the case of conglomerates) [16] who could be subjected to punitive pressures in retaliation for their support of the Chamber's labor relations objectives in future matters unrelated to the instant litigation.

A writ of mandamus should have been granted by the court of appeals because the district court committed fundamental error by ordering disclosure of the Chamber's Michigan membership list and by failing to safeguard such disclosure against widespread dissemination with an adequate protective order. Therefore, the instant appeal presents the Court with an important opportunity to define and elaborate the factual and substantive areas when a writ of mandamus in pre-trial discovery is appropriate, and will further permit the Court to give direction to the courts of appeals in creating more uniform mandamus standards. See generally, Comment, "Appealability in the Federal Courts", 75 Harv. L. Rev.

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[16] While the district court's Memorandum Opinion purports to limit disclosure to only those of the Chamber's members who are subject to the Michigan Employment Security Act, the order also identifies Chamber members outside Michigan because many of these members are among the nation's larger corporations and conglomerates with operations in numerous other states.

350, 375-78 (1961).[17] Such definitive guidance is essential particularly because this Court has already embarked upon the task of defining a more flexible mandamus standard. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 255 (1957); *Schlagenhauf* v. *Holder*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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[17] The Eighth Circuit grants mandamus to review an interlocutory discovery order which present a "really extraordinary" question and where appeal after disclosure would be inadequate. *Pfizer* v. *Lord*, 456 F.2d 515, 518 (8th Cir. 1972). The Seventh Circuit grants mandamus to review such orders where there is a question of substantial importance and where appeal would be inadequate. *Harper and Row Publishers, Inc.* v. *Decker*, 423 F.2d 487, 492 (7th Cir. 1970), affirmed, 400 U.S. 348 (1971) (by an equally divided court). The Fourth Circuit allows mandamus to review and vacate an interlocutory discovery order on the clearly erroneous standard. *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974).